Public Prosecutor v Lam Peng Hoa & Anor

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 58-8-1994
KANG HWEE GEE J
25 JUNE 1996

Criminal Law *— Dangerous Drugs Act (Malaysia) — ss 2, 39B — Trafficking in cannabis — Definition of 'cannabis' — Failure of chemist report to refer to 'cannabis' as defined in s 2 — Whether drugs analysed were 'cannabis' within s 2 or 'cannabis (Indian hemp)' under First Schedule — Whether there was possession*

Evidence *— Witness — Calling of witness by prosecution — Chemist report tendered and admitted as substantive evidence — Whether chemist may be called to testify on matter pertaining to her analysis of the drugs — Whether oral evidence would contravene s 91 of the Evidence Act 1950 — Criminal Procedure Code (FMS Cap 6) s 399 — Evidence Act 1950 s 91*

Evidence *— Hearsay — Statement made by person not called — Whether diligent and exertive attempts made to procure witness — Evidence Act 1950 s 32(1)(i)*

Words and Phrases *— 'Possession' — Dangerous Drugs Act 1952*

The accused persons in this case were jointly charged with the offence of trafficking in with common intention 663g of cannabis under s 39B of the Dangerous Drugs Act 1952 ('the DDA 1952'), an offence which carries the death penalty upon conviction. The accused persons were arrested in a room at the upper floor of a double-storey terrace house by a police party. According to one Doong Neng Sing ('PW7'), the caretaker and representative of the proprietor of the house, the house was let to one Madam Lam Siew Yong. At the time of the incident when the police party entered the house, she was downstairs at the sitting room area. A statement under s 112 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') was subsequently recorded from her but she could not now be traced and therefore she could not be subpoenaed to give evidence at the trial. Consequently, the prosecution applied to tender her statement as evidence under s 32(1)(i) of the Evidence Act 1950 ('the Evidence Act'). The plant materials found were subsequently analysed by the government chemist, one Lam Yoke Ching, whose report confirmed that they were 'cannabis' as defined in the DDA 1952 with the total weight of 663g. The report however did not state specifically that the plant materials analysed were 'cannabis' as defined in s 2 of the DDA 1952. During the trial the prosecution proposed to call the same chemist to give evidence.

Held, convicting the accused persons on an amended charge:

(1) The chemist report had been served on both the accused persons by the investigating officer, in compliance with the ten-clear-day requirement under s 399 of the CPC. As the defence had not given any notice under s 399(1)(b) of the CPC to require the

attendance of the chemist, the report must therefore be accepted as conclusive evidence for the prosecution, of the finding of the chemist of the nature of the drug recovered and its total weight (see p 412A–B).

(2) The chemist, if called, would not be allowed to give any evidence in respect of the conduct of her analysis of the drug. Firstly, as the chemist report had been tendered as substantive evidence under s 399 of the CPC, no oral evidence can be given by the chemist of her analysis of the drug. To allow the chemist to give such evidence would tantamount to allowing the admission of two sets of substantive evidence from the same witness, which the prosecution would not have otherwise been entitled to do had they called the chemist to give oral evidence. Secondly, once a chemist report has been admitted as substantive evidence under s 399 of the CPC, it falls squarely into that class of matter 'required by law to be reduced to the form of a document' under s 91 of the Evidence Act. It would not therefore be permissible by the operation of s 91 of the Evidence Act for the prosecution to give any other evidence in proof of the matter, except the document itself (see pp 412D–I).

(3) It was clear that no diligent or exertive attempt had been made to procure Madam Lam Siew Yong. Unless it was proved to the satisfaction of the court that the police had employed due diligence and reasonable exertion to locate the witness and were able to assess the chances of the success of procuring her, there could be no basis to find that she could not be procured without an amount of delay or expense (see p 414C–I); *PP v Mohamed Said* [1984] 1 MLJ 50 followed.

(4) In the circumstances under which the drugs were found, relative to the positions both the accused persons were in, there could be no doubt that they had joint possession of all the drugs on the floor around them. The prosecution therefore had, at the close of its case, proved that they were in joint possession not only of the drugs held in their hands but also of all the drugs on the floor (see p 417E).

(5) A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner, to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. In the instant case, both the physical element (proximity to the drugs) as well as the mental element (the intention of dealing with it as if it belonged to them) were clearly present. The fact that there were other occupants in the house (in two other rooms) on the same floor and another at the hall downstairs at the time of their arrest, would not change the status of the accused persons as joint possessors of the drugs. Further, the fact that they may not be the permanent occupiers of the room would not make any difference. They were alone in

A that room and were the sole occupiers for that duration of time, sufficient for possession under the circumstances to be attributed to them (see p 417F–418G); *Chan Pean Leon v PP* [1956] MLJ 237 followed and *Lee Chee Meng v PP* [1992] 1 MLJ 322 distinguished.

B (6) The chemist report, by not referring to 'cannabis' as defined in s 2 of the DDA 1952, was clearly infirm, thereby opening it to a construction that the drug analysed could either be 'cannabis' or 'cannabis (Indian hemp)'. Therefore, pursuant to s 180 of the CPC, it was found that the prosecution had made out a case only of a lesser charge of joint possession of cannabis (Indian hemp) C under s 12(2) of the DDA 1952. The charge should thus be amended and the accused persons were called to enter their defence on the lesser charge of joint possession of cannabis (Indian hemp) under s 12(2) of the DDA 1952. As they chose to remain silent, they would be found guilty and convicted (see pp D 419E–I); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 followed.

Obiter:

Section 32(1)(i) and (j) of the Evidence Act should be read disjunctively. The word 'and' which joins sub-s (i) and (j) could E admit of no more significance than an exposition of the draftsman's preference of a conjunction as an ending to all the provisions in sub-s(1) of s 32. It is clear that the language used in s 32(1)(i) and (j) is so plain that it is hardly necessary to embark on the task of interpretation (see p 416I–417A); *PP v Michael Anayo Akabogu* [1995] 3 MLJ 42 not followed.

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[Bahasa Malaysia summary

Tertuduh dalam kes ini telah dituduh secara bersama dengan kesalahan mengedar dengan niat bersama 663g cannabis di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB 1952'), satu kesalahan G yang membawa hukuman mati, atas sabitan. Tertuduh telah ditangkap dalam sebuah bilik di tingkat atas sebuah rumah teres dua tingkat oleh satu pasukan polis. Menurut seorang bernama Doong Neng Sing ('SP7'), iaitu penjaga dan wakil tuanpunya rumah, rumah tersebut telah disewa kepada seorang Puan Lam Siew Yong. Pada H masa kejadian tersebut semasa pasukan polis telah memasuki rumah itu, dia sedang berada di tingkat bawah di kawasan bilik istirehat. Satu pernyataan telah direkodkan kemudiannya daripadanya di bawah s 112 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), tetapi sekarang dia tidak dapat dikesan, maka dia tidak dapat disepinakan untuk memberi keterangan semasa perbicaraan. Oleh itu, pihak pendakwa I telah memohon untuk mengemukakan pernyataannya sebagai keterangan di bawah s 32(1)(i) Akta Keterangan 1950 ('Akta Keterangan'). Bahan tumbuhan yang dijumpai, kemudiannya telah dianalisakan oleh ahli kimia kerajaan, seorang bernama Lam Yoke Ching, dan telah disahkan dalam laporannya bahawa bahan itu adalah

'cannabis' seperti yang ditakrifkan dalam ADB 1952 dengan jumlah berat sebanyak 663g. Walau bagaimanpun laporan tersebut tidak menyatakan dengan tertentu bahawa bahan tumbuhan yang dianalisakan adalah 'cannabis' seperti yang ditakrifkan dalam s 2 ADB 1952. Semasa perbicaraan pihak pendakwa telah bercadang untuk memanggil ahli kimia yang sama itu untuk memberi keterangan.

Diputuskan, mensabitkan tertuduh atas pertuduhan yang dipinda:

(1) Laporan ahli kimia tersebut telah diserahkan pada kedua-dua tertuduh oleh pegawai penyiasatan, menurut kehendak sepuluh hari seperti yang diperlukan oleh s 399 KAJ. Oleh kerana pihak pembela telah tidak memberikan notis di bawah s 399(1)(b) KAJ untuk meminta kehadiran ahli kimia, maka laporan tersebut harus diterima sebagai keterangan muktamad untuk pihak pendakwa akan keputusan ahli kimia mengenai jenis dadah yang ditemui dan jumlah beratnya (lihat ms 412A–B).

(2) Ahli kimia, jika dipanggil, tidak akan dibenarkan memberi keterangan mengenai pengendalian analisa dadah. Pertamanya, oleh kerana laporan ahli kimia telah dikemukakan sebagai keterangan substantif di bawah s 399 KAJ, tiada keterangan lisan boleh diberikan oleh ahli kimia mengenai penganalisaan dadah yang dilakukannya. Jikalau ahli kimia dibenarkan memberikan keterangan, maka boleh dikatakan bahawa dua set keterangan dari saksi yang sama telah diterimamasuk, yang mana pihak pendakwa, jikalau ianya telah memanggil ahli kimia untuk memberi keterangan lisan, tidak akan dibenarkan berbuat demikian. Keduanya, sebaik sahaja laporan ahli kimia telah diterimamasuk sebagai keterangan substantif di bawah s 399 KAJ, maka ianya termasuk dalam kelas perkara 'required by law to be reduced to the form of a document' di bawah s 91 Akta Keterangan. Maka berdasarkan s 91 Akta Keterangan, pihak pendakwa tidak dibenarkan mengemukakan sebarang keterangan lain untuk membuktikan perkara tersebut, selain daripada dokumen itu sendiri (lihat ms 412D–I).

(3) Adalah jelas bahawa tidak terdapat usaha yang bersungguh-sungguh dan tekun untuk mencari Puan Lam Siew Yong. Hanya jikalau telah dibuktikan sehingga memuaskan mahkamah bahawa usaha yang bersungguh-sungguh dan tekun telah diambil oleh polis untuk mengesan saksi tersebut dan mereka telah boleh menilaikan kebarangkalian kejayaan mereka, maka tidak ada dasar untuk memutuskan bahawa saksi tersebut tidak dapat dicari tanpa kelengahan ataupun perbelanjaan yang bukan sedikit (lihat ms 414C–I); *PP v Mohamed Said* [1984] 1 MLJ 50 diikut.

(4) Dalam keadaan di mana dadah tersebut telah dijumpai, relatif kepada kedudukan di mana kedua-dua tertuduh berada, maka tidak ada keraguan bahawa tertuduh telah mempunyai milikan bersama akan semua dadah atas lantai di sekeliling mereka. Maka pihak pendakwa, pada penghujung kes mereka, telah

membukitkan bahawa tertuduh telah mempunyai milikan bersama, bukan sahaja dadah dalam tangan mereka tetapi juga kesemua dadah di atas lantai (lihat ms 417E).

(5) Sesuatu yang boleh alih dikatakan berada dalam milikan seseorang apabila dia berada dalam kedudukan berkenaan dengannya sehinggakan dia mempunyai kuasa untuk menguruskannya sebagai tuanpunya, tanpa campurtangan orang lain, dan apabila keadaannya adalah sedemikian sehinggakan ianya boleh dianggap bahawa dia bermaksud untuk berbuat begitu jika perlu. Dalam kes ini kedua-dua unsur fizikal (dekatnya tertuduh kepada dadah itu) dan unsur mental (niat untuk menguruskan dadah itu bagaikan ia kepunyaan mereka) jelas wujud. Fakta bahawa terdapatnya penghuni-penghuni lain dalam rumah tersebut (dalam dua bilik yang lain) pada tingkat yang sama dan seorang lagi di kawasan ruang depan di tingkat bawah pada masa mereka ditangkap, tidak akan menukarkan status mereka sebagai pemilik bersama dadah tersebut. Tambahan pula, fakta bahawa mereka mungkin bukan penghuni tetap bilik tersebut tidak membawa apa-apa perbezaan. Mereka bersendirian dalam bilik tersebut dan merupakan penghuni tunggal untuk tempoh masa itu, yang memadai untuk milikan dalam keadaan sedemikian dianggap terletak pada mereka (lihat ms 417F–418G); *Chan Pean Leon v PP* [1956] MLJ 237 diikut dan *Lee Chee Meng v PP* [1992] 1 MLJ 322 dibeza.

(6) Laporan ahli kimia yang tidak merujuk kepada 'cannabis' seperti yang ditakrifkan oleh s 2 ADB 1952, adalah jelasnya lemah, dan dengan itu telah membuka laporan itu kepada tafsiran bahawa dadah yang dianalisakan itu boleh jadi, sama ada 'cannabis' ataupun 'cannabis (Indian hemp)'. Maka, menurut s 180 KAJ, telah didapati bahawa pihak pendakwa telah membuktikan kes hanya atas tuduhan yang lebih rendah iaitu milikan bersama cannabis (Indian hemp) di bawah s 12(2) ADB 1952. Tuduhan oleh itu patut dipinda dan tertuduh dipanggil untuk mengemukakan pembelaan mereka kepada tuduhan lebih rendah milikan bersama cannabis (Indian hemp) di bawah s 12(2) ADB 1952. Oleh kerana mereka membuat pilihan bersenyap, mereka didapati bersalah dan disabitkan (lihat ms 419E–I); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 diikut.

Obiter:

Seksyen 32(1)(i) dan (j) Akta Keterangan patut dibaca berasingan. Perkataan 'dan' yang menghubungkan seksyen kecil (i) dan (j) tidak boleh membawa tekanan yang lebih daripada pilihan yang dibuat oleh penggubal kepada jenis kata penghubung sebagai penamat kepada kesemua peruntukan seksyen kecil (1) kepada s 32. Adalah jelas bahawa bahasa yang digunakan dalam s 32(1)(i) dan (j) adalah begitu biasa sehinggakan tidaklah perlu untuk memulakan tugas pentafsiran (lihat ms 416I–417A); *PP v Michael Anayo Akabogu* [1995] 3 MLJ 42 tidak diikut.]

[*Editorial Note*: The accused persons have appealed to the Court of Appeal vide Criminal Appeal Nos A05–39–96 and A05–40–96 respectively.]

Notes

For cases on statements made by persons not called as witnesses, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1050–1064.

For cases on the admissibility of a chemist report, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 717–720.

For a case on the definition of 'cannabis', see 4 *Mallal's Digest* (4th Ed) para 26.

For cases on possession, see 4 *Mallal's Digest* (4th Ed) paras 116–141.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237
Grey v Pearson (1857) 6 HL Cas 61
Lee Chee Meng v PP [1992] 1 MLJ 322
PP v Lin Lian Chen [1992] 2 MLJ 561
PP v Michael Anayo Akabogu [1995] 3 MLJ 42
PP v Mohamed Said [1984] 1 MLJ 50
Saw Thean Teik v R [1953] MLJ 124
Shukri bin Mohamad v PP [1995] 3 MLJ 229
Sim Tiew Bee v PP [1973] 2 MLJ 200

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 107, 112, 399
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 12(2), (3), 39B
Evidence Act 1950 ss 32(1)(i), (j), 91, 136, 157
Penal Code (FMS Cap 45) s 34

Raja Rozela bte Raja Toran (Deputy Public Prosecutor) for the Public Prosecutor.

Manjit Singh and *K Subramaniam* (*Manjit, Subra & Associates*) for the first accused.

Gurbachan Singh (*Bachan & Kartar*) for the second accused.

Kang Hwee Gee J: Both the accused persons in this case were charged jointly with common intention with the offence of trafficking in 663g of cannabis under s 39B of the Dangerous Drugs Act 1952 ('the DDA 1952'), an offence which carries the death penalty upon conviction.

Both the accused persons were arrested in a room at the upper floor of a double-storey terrace house, No 17 Persiaran Cempaka Sari 8, Taman Cempaka, Ipoh, by a police party led by Chief Inspector Mohamad bin Yahya ('PW4').

Upon entering the room which was shut but not locked, PW4 and Detective Lance Corporal Amran bin Hashim ('PW5') found both the accused persons sitting on the floor, each one of them holding a plastic

A packet containing plant materials. The first accused was only in his underpants while the second accused was in his T-shirt and shorts.

Upon seeing them, both the accused persons dropped the packets they were holding in their hands on to sheets of newspaper which were spread in front of the first accused on the floor, and which contained more B of the same plant materials. A large quantity of the same plant materials in plastic packets and other incriminating exhibits were also found on the floor near the accused persons, the details of which will be described later in this judgment.

The relative position of the lots of plant materials recovered is best C depicted by the photographs (exhs P5A to D) which were taken *in situ* by the police photographer Detective Lance Corporal Naimuddin bin Hassan ('PW2') before they were removed.

Two other occupants of the house at the time were also arrested along with the accused persons. They were Yap Peng Kheong ('PW8') who was found in the middle room, and Yap Chee Kheong who was found D in the back room on the same floor. The latter could not now be traced.

According to Doong Neng Sing ('PW7'), the caretaker and representative of the proprietor of the house, the house was let to one Madam Lam Siew Yong. At the time of the incident when the police party entered the house, she was downstairs in the sitting room area. A statement E was subsequently recorded from her by virtue of s 112 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), but she could not now be traced and therefore could not be subpoenaed to give evidence at the trial. Consequently, the prosecution applied to tender her statement as evidence under s 32(1)(i) of the Evidence Act 1952 ('the Evidence Act'), which was disallowed for reasons which I shall revert to later.

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The plant materials were subsequently analysed by the government chemist, Lam Yoke Ching, whose report (exh P32) confirms that they were 'cannabis' as defined in the DDA 1952 with the total weight of 663g. The report however did not state specifically that the plant materials analysed were 'cannabis' as defined in s 2 of the DDA 1952.

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At the close of the case for the prosecution, I found it necessary (for reasons which I shall revert to later in this judgment) to amend the charge against both the accused persons to one of possession simpliciter of cannabis (Indian hemp) under s 12(2) of the DDA 1952. The accused persons were called to enter their defence on the amended charge which read as follows:

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> Bahawa kamu dengan niat yang sama pada 8 April 1994, lebih kurang 11.30 pagi, di bilik hadapan tingkat atas rumah No 17 Persiaran Cempaka Sari 8, Taman Cempaka, Ipoh, dalam Daerah Kinta, Negeri Perak Darul Ridzuan, telah memiliki dadah berbahaya iaitu cannabis dengan beratnya 663g dan oleh yang demikian, kamu secara bersama telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah I s 12(3) Akta yang sama dibaca dengan s 34 Kanun Keseksaan (NMB Bab 45).

They chose to remain silent. Consequently, they were found guilty and convicted and sentenced to five years' imprisonment with effect from their

date of arrest. Before I state my grounds, I shall first deal with two applications made in the course of the trial by the prosecution.

APPLICATION BY PROSECUTION TO CALL CHEMIST TO CLARIFY REPORT

The chemist report had been served on both the accused persons by the investigating officer in compliance with the ten-clear-day requirement under s 399 of the CPC. As the defence had not given any notice under s 399(1)(b) of the CPC to require the attendance of the chemist, the report must therefore be accepted as conclusive evidence for the prosecution of the finding of the chemist, with respect to the nature of drug recovered and its total weight. When the learned deputy public prosecutor proposed to call the same chemist to give evidence, I had to act under s 136 of the Evidence Act to require her to state in what manner the evidence she proposed to elicit from the chemist would be relevant. On being informed that the chemist would be called to explain the conduct of her analysis in the drug, I ruled that the chemist, if called, would not be allowed to give any evidence in respect of the conduct of her analysis of the drug, for the following reasons:

The chemist report had already been admitted as evidence

It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as substantive evidence of its contents, but as corroboration of his oral evidence in court under s 157 of the Evidence Act (see *Saw Thean Teik v R* [1953] MLJ 124 followed in *PP v Lin Lian Chen* [1992] 2 MLJ 561). Conversely, if the chemist report has been tendered as substantive evidence under s 399 of the CPC, it follows that no oral evidence can be given by the chemist in respect of his analysis of the drug. To allow the chemist to give such evidence would tantamount to allowing the admission of two sets of substantive evidence from the same witness, which the prosecution would not have otherwise been entitled to do, had they called the chemist to give oral evidence.

Section 91 of the Evidence Act applies

A chemist report is not per se a 'matter' required by law to be in the form of a document as in the case of a police report under s 107 of the CPC and a statement under s 112 of the CPC. But once the chemist report has been admitted as substantive evidence under s 399 of the CPC, it falls squarely in that class of matter 'required by law to be reduced to the form of a document' under s 91 of the Evidence Act. It would not therefore be permissible by the operation of s 91 of the Evidence Act, for the prosecution to give any other evidence in proof of the matter except the document (the chemist report) itself.

APPLICATION TO TENDER THE STATEMENT OF MADAM LAM SIEW YONG AS EVIDENCE

Section 32 of the Evidence Act reads:

A (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

B [(a) to (h) not relevant]

(i) when the statement was made in the course of, or for the purpose of, an investigation or inquiry into an offence under or by virtue of any written law; and

(j) where the statement was made by a public officer in the discharge C of his duties.

(2) The provisions of paragraphs (i) and (j) of subsection (1) shall apply only in relation to a criminal proceeding.

The prosecution relied on the following attempts to trace the witness to D invoke the provision of s 32(1)(i):

(1) On 24 April 1995 at about 10am, Lance Corporal Rohani bin Mohamed Nor ('PW10') went to house No 17 Persiaran Cempaka Sari 8, Taman Cempaka, Ipoh, to serve a subpoena on the witness. He was informed by an occupant of the said house that the witness E was not an occupant of that house. He visited the same house again on 25 May 1995 and 13 October 1995 but failed to trace the witness.

(2) In November 1995, the investigating officer, ASP Umar Ali Saifuddin bin Shahruddin ('PW3') tried to trace the witness at the house of incident but discovered that she was no longer staying in that house. In April 1996, just before this trial commenced, he made enquiries F by telephone to the Jabatan Pendaftaran Negara at Kuala Lumpur and obtained the witness' old address, ie No 26B Jalan Raja Laut, Kuala Lumpur. Following an enquiry he made to the Dang Wangi Police Station, Kuala Lumpur, he was informed that the witness was not staying at the said address. He also ascertained from the G Immigration Department, Perak, that no passport had been issued to the witness.

(3) On 10 April 1996 at about 9.50am, Lance Corporal Othman bin Saidin ('PW9') called at No 15 Persiaran Cempaka Sari 24, Taman Cempaka, Ipoh, to trace the witness. He was informed by an occupant of the house that he did not know the witness.

H It was held in the Federal Court case of *Sim Tiew Bee v PP* [1973] 2 MLJ 200 that before the court could admit the statement of a witness as evidence under s 32 of the Evidence Act, the condition precedent contemplated under the section must be satisfied. The condition precedent that the prosecution ought to satisfy in the present case was either to prove I that the witness could not be found or that her attendance could not be procured, without an amount of delay or expense. The learned authors of *Sarkar's Law of Evidence* (14th Ed) at p 649 state (relying on Indian authorities) that where no diligent search and reasonable exertion were

made to procure the witness, the court could not come to a finding that the witness could not be found and therefore his statement could not be admitted under the section. Mere ignorance of the whereabouts of the witness is not sufficient to invoke the section. As the interpretation appears to be somewhat sound, I will, for the present case, adopt their view. It stands to reason that unless stringent conditions are prescribed and fulfilled, the established rule against the reception of hearsay evidence would be eroded; courts would have to accept as evidence statements which may not stand the vigours of cross-examination had the maker been called to give evidence.

In *PP v Mohamed Said* [1984] 1 MLJ 50, Mohamed Azmi J (as he then was) observed, at p 51 :

> If a particular witness is material to the prosecution's case, it is the duty of the police to keep track of his whereabouts and take all precautionary measures that they be informed of any change of address. Under s 34(ii) of the CPC, the responsibility of serving summonses or subpoenas on the accused persons and witnesses is with police officers, unless the court otherwise directs. If a particular witness is very material to the prosecution's case, it stands to reason that the police must exercise extra diligence in applying for summonses early and in taking all necessary steps to ensure that the correct address of the witness has been obtained, bearing in mind the unreliabililty nowadays of the addresses given on identity cards. The correct addresses of the material witnesses should be obtained at the first opportunity and, if necessary, the police can invoke ss 111 and 112 of the CPC at the investigation stage. Section 111 of the CPC empowers the police to require their attendance at the police station so that they can be questioned under s 112 of the CPC. If they do not attend, then under sub-s (ii) of s 111, they may be compelled to attend by a magistrate (see *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50 at p 54). Where the person to be summoned cannot by the exercise of due diligence be found, then under s 35(iv) of the CPC, the summons may be served by leaving a copy thereof for him with some adult member of his family or with his servant residing with him. If service under s 35(iv) of the CPC cannot be effected, then the prosecution should invoke s 36 of the CPC, by affixing a copy of the summons to some conspicuous part of the house or other place in which the person summoned ordinarily resides, if so directed by the court. When a witness fails to appear in court after being served under ss 35 or 36 of the CPC, the prosecution is then entitled to apply for warrant of arrest under s 47 of the CPC. In the present case, it would appear that none of these powers given by the CPC to compel the appearances of the two material witnesses had been exhausted by the police, either in the first or second prosecution.

In the present case it is clear to me that no diligent or exertive attempt had been made to procure the witness. The fact that the witness was no longer staying at the place of the incident or at her former address in Kuala Lumpur was already known to the investigating officer, as long ago as November 1995. Yet no attempts were made beyond trying to locate her at addresses the police knew she was no longer keeping.

The requirements proposed in *PP v Mohamed Said* [1984] 1 MLJ 50 may appear stringent and cumbersome; but these are prescribed avenues under the CPC which the prosecution must go through to trace a witness,

without which the court may not be able to act to admit a statement under s 32 of the Evidence Act.

The same considerations would apply to the other conditions precedent. Unless it is proved to the satisfaction of the court that they had employed due diligence and reasonable exertion to attempt to locate the witness and were able to assess the chances of the success of procuring her, there could be no basis to find that she could not be procured without an amount of delay or expense. Accordingly, I had to refuse the prosecution's application.

While still on the subject, it may be appropriate for me to consider a salient point raised by the defence in respect of the interpretation of s 32(1)(i) and (j) of the Evidence Act although the issue would now be academic, as I had already disallowed the prosecution's application. In *PP v Michael Anayo Akabogu* [1995] 3 MLJ 42, the High Court at Penang held that the two subsections must be read conjunctively. In any event, even reading the subsections conjunctively, counsel submitted that the prosecution could not rely on s 32(1)(i) to admit the statement of Lam Siew Yong, as she was not an officer discharging any duty. The rationale of that interpretation appears in the following passage at p 48 of the judgment:

> A disjunctive reading of s 32(1)(i) of the Evidence Act will therefore be too great a breach, and an unacceptable inroad to the hearsay rule. It is trite law that penal provisions are to be narrowly construed; if arguably s 32(1)(i) and (j) are not penal provisions, then undoubtedly they are provisions leading to proof in criminal proceedings and conviction of an offence. The infirmities, ambiguities and defects in the language of the inserted provisions must therefore be narrowly construed, but a disjunctive reading of the inserted subsections would give to it a wider interpretation than the natural meaning and impact of the language used.
>
> Subsections 32(1)(i) and (j) are conjoined by 'and' between it, conspicuously absent in s 32 (pre-amendment) in cases (a) to (h). Brought in together, the intention of the legislature was therefore to bind the two inserted sub-sections, which incidentally is the only way it could be rationalized with reason (a) underlining s 32.
>
> There is reason further for this conjunctive construction. Each of the eight cases in s 32 (pre-amendment) is preceded by the word 'when', the signature word to mark out the contingency, and s 32(1)(i) is similarly preceded by 'when'; the singular exception being s 32(1)(j) preceded by 'where'.
>
> The same word in the same provision must carry the same meaning, and if indeed it was intended for s 32(1)(i) and (j) to be read disjunctively, the legislature would surely have followed the proven format and language of s 32 (pre-amendment), and s 32(1)(j) would be preceded by 'when' just as in the other nine cases.
>
> This departure from the proven term 'when' denoting a separate case and the introduction of 'and' between (i) and (j) singled out s 32(1)(j) for special application. Subsections 32(1)(i) and (j) were therefore specifically inserted as a joint package to be read conjunctively, an interpretation fortified by the provisions of s 32(2) that it shall apply only to criminal proceedings, quite unlike the rest of the provisions of s 32 that apply to all proceedings

> Conjoined by 'and', s 32(1)(j) qualifies that a statement under s 32(1)(i) must be one where the statement is made by a public officer in the course of his duties.

With respect, I do not share the same view. I cannot see why the two subsections should be read conjunctively when they are plainly disjunctive. They provide for two different situations when s 32 of the Evidence Act can be invoked. Section 32(1)(i) of the Evidence Act was meant to apply to statements made by any person in the course of or for the purposes of an investigation or inquiry into an offence. Such a situation envisaged the giving of statements to someone authorized by law to take them while investigating or inquiring into an offence. On the other hand sub-s (1)(j) was meant to apply to statements made by a public officer in the discharge of his duties as in the case of a medical officer who examined a patient and had to write out his diagnosis and prognosis to be kept as the patient's medical record. In the event that the medical officer cannot be called to give evidence in a subsequent criminal trial which requires evidence of the patient's state of health, his statement (the patient's medical record) cannot be admitted under sub-s (1)(i) because the statement was not made in the course of or for the purpose of an investigation or inquiry into an offence, but could be admitted under sub-s (1)(j), being statements made by him in the discharge of his duty.

Consider this senario: A firearm had been used in the commission of a murder. It was required to prove that the weapon was owned by a certain person who committed the offence. An entry in the firearms register kept by a police licensing officer may be admitted to show that the firearm was issued to that person under sub-s (1)(j) as a statement made by a public officer in the course of his duty, but not under sub-s (1)(i), as the statement was not made in the course of investigation or enquiry into an offence.

That the two subsections were meant to be disjunctive and to provide for two different situations is clearly discernible from the following sub-s (2) which uses the word 'provision' in the plural and not in the singular.

The use of 'where' in sub-s (1)(j) does not appear to me to be inconsistent with 'when' in (a) to (j) to lead to absurdity or repugnancy that would require an approach beyond applying the literal canon of interpretation as expressed in the oft cited passage of Lord Wenslelydale in *Grey v Pearson* (1857) 6 HL Cas 61 as quoted in *Maxwell on Interpretation of Statutes* (11th Ed) at p 6 as follows:

> In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instruments, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

Similarly, the word 'and' which joins sub-s (1)(i) and (j) could admit of no more significance than an exposition of the draftman's preference of a conjunction as an ending to all the provisions in sub-s (1) of s 32. It is clear to me that the language used in s 32(1)(i) and (j) is so plain that it is hardly necessary to embark on the task of interpretation. *Absoluta sententia expositore*

A *non indiget* (It is not allowable to interpret what has no need of interpretation).

I could not therefore accept counsel's submission on this point.

THE SUBSTANTIVE ISSUE: HAS THE PROSECUTION PROVED POSSESSION?

B A salient feature one must bear in mind in the present case is the fact that each of the accused persons had been observed to have been having in his hand a packet containing the drugs at the time when the police party entered the room. This was clear from the uncontradicted evidence of the main witnesses of the prosecution, PW4 and PW5, which I must accept. The accused persons were comfortably seated on the floor surrounded by
C a large amount of drugs when the police entered the room. Spread on the floor around them was a large amount of the drugs in plastic packets. There were 430 stapled plastic packets and 78 open plastic packets. On top of some sheets of Chinese newspaper was another quantity of the same drugs in loose form together with another 37 open plastic packets of the
D drugs. A number of empty plastic packets were also found on the floor. Each accused person was seen holding in their hands, an open packet of the drugs which they dropped onto the newspaper on becoming aware of the presence of the police. A wallet containing, among others items, an identity card, a bank card and a driving licence belonging to the first accused was also recovered from the floor.

E In the circumstances under which the drugs were found, relative to the positions both the accused persons were in, there could be no doubt in my mind that they had joint possession of all the drugs on the floor around them. I would therefore have to find that the prosecution had, at the close of its case, proved that they were in joint possession not only of the drugs
F held in their hands but also of all the drugs on the floor.

As an authority, I need to quote in extenso the oft cited passage of Thompson J in *Chan Pean Leon v PP* [1956] MLJ 237 at p 239:

> 'Possession' itself as regards criminal law is described as follows in *Stephen's Digest* (9th Ed) at p 304:
>
> G
>
> > 'A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.'
>
> To put it otherwise, there is a physical element and a mental element which
> H must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example, have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occassion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the
> I nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a

> table in a room in which I am, but which is also frequently used by other people, then the mere fact that I am in physical proximity to it does not give rise to to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or have done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found, shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own, had the intention of doing so.

In the instant case, both the physical element (proximity to the drug) as well as the mental element (the intention of dealing with it as if it belonged to them) as envisaged in *Chan Pean Leon v PP* [1956] MLJ 237 were clearly present. The fact that there were other occupants in the house (in two other rooms) on the same floor and another at the hall downstairs at the time of their arrest would not change their status as joint possessors of the drugs. Further, the fact that they may not be the permanent occupiers of the room would not make any difference. They were alone in that room and were the sole occupiers for that duration of time, sufficient for possession, under the circumstances to be attributed to them.

Lest I be misconstrued, I must state here that the circumstances from which possession could be inferred in the instant case were different from those line of cases which decided on the exclusivity of possession, notably the Supreme Court case of *Lee Chee Meng v PP* [1992] 1 MLJ 322. In that case drugs were recovered from a vanity case and a shoe box in a room occupied by two persons. It was held, inter alia, that there could be no custody or control (and therefore no presumption of possession under section 37(d) of the DDA 1952) as the room in which the drugs were recovered was accessible to their friends who frequently visited them. Unlike *Lee Chee Meng v PP*, in the instant case the drugs were not just recovered from places in the room. They were recovered from the floor around both the accused persons who were seated and handling them at the time from which one could legitimately draw the inference that they were in the joint possession of the accused persons.

HAS THE PROSECUTION PROVED THE CHARGE OF TRAFFICKING?

Having proved possession, the prosecution would have to rely entirely on the chemist report to invoke the presumption under s 37(da) of the DDA 1952 to prove trafficking.

To successfully apply this presumption, the chemist report must conclusively show not only that the weight of the plant materials weighed 200g or more but also that they were cannabis under s 37(da)(vi) of the DDA 1952.

A In the recent case of *Shukri bin Mohamad v PP* [1995] 3 MLJ 229, the Federal Court held that where the chemist gave evidence that the drugs he analysed were 'cannabis' as defined in the DDA 1952, without referring to s 2 of the DDA 1952, his analysis could give rise to the inference that he did not have in mind the ingredients of 'cannabis' as defined therein. It was therefore open to construction that the plant B materiels examined by the chemist could either be 'cannabis' within the meaning of s 2 of the DDA 1952 or 'cannabis (Indian hemp)' as listed in Part III of the First Schedule of the DDA 1952. But whereas there could be a presumption of trafficking in respect of possession of cannabis exceeding 200g under s 37(da) to the DDA 1952, no such presumption could C operate in respect of possession of cannabis (Indian hemp), as cannabis (Indian hemp) is not included in the subsection. The court therefore at p 236 of the case applied the canon of construction that:

> ... where the court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make D a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

The court substituted the conviction of trafficking in cannabis under s 39B of the DDA 1952 for one of possession of cannabis (Indian hemp) under s 12(2) of the DDA 1952 and sentenced the accused in that case to the E maximum term of five years' imprisonment under s 12(3) of the DDA 1952.

Shukri's case involves the infirmities in the oral testimony of a chemist. But the same principle should apply to such evidence introduced through a chemist report under s 399 of the CPC as in the present case, which also made no reference to s 2 of the DDA 1952. By not referring to cannabis F as defined in s 2 of the DDA 1952, the report was clearly infirm, thereby opening it to a construction (as in the *Shukri*'s case) that the drugs analysed could either be 'cannabis' or 'cannabis (Indian hemp)'. Applying *Shukri*'s case, I must, pursuant to s 180 of the CPC, so find that the prosecution had made out a case only of the lesser charge of joint possession G of cannabis (Indian hemp) under s 12(2) of the DDA 1952 and call them to enter their defence on the lesser charge of joint possession of cannabis (Indian hemp) under s 12(2) of the DDA 1952. Hence the amendment.

For the large amount of drugs that was found in the joint possession of the accused persons which would have otherwise attracted the death H penalty, the least sentence for an offence of a lesser degree of seriousness that the court could pass would, as in the *Shukri*'s case, have to be the maximum five years allowable under s 12(3) of the DDA 1952 to take effect from their date of arrest.

Accused convicted on amended charge.

I

Reported by Mariette Peters-Goh